



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/01250/2020

THE IMMIGRATION ACTS

Heard at Field House
On 18th August 2021

Decision & Reasons Promulgated
On 8th October 2021

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE WILDING

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS BETZAIDA HERNANDEZ SIVERIO
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the appellant: Mr T Lindsay, Senior Home Office Presenting Officer
For the respondent: Mr T Nawaz, Legal Representative

DECISION AND REASONS

1. Ms Siverio is a national of Spain born on 30 November 1980. In a decision dated 18 February 2021 first-tier Tribunal Judge Shand QC allowed her appeal against the Secretary of State's decision to refuse her entry under the EEA regulations.
2. This is the Secretary of State's appeal against the judge's decision. The Secretary of State was the respondent in the first-tier Tribunal the respondent before us was the

appellant in the first-tier Tribunal and for ease of reading we refer to the two parties as they were before the first-tier Tribunal.

Background

3. The appellant arrived in the United Kingdom on 14 January 2020 on a flight from Tenerife. She presented her Spanish passport and her Spanish national identity card and sought admission to the UK as an EU citizen exercising her rights under the EU Treaties. Following checks made by border control for pre-settled status, the appellant had declared an overseas conviction for attempted murder in 1999, for which she received a 5-year custodial sentence. The appellant explained that she was 17 or 18 years old at the time of the incident, that the victim was her mother's boyfriend, and that she had stabbed him when he tried to take advantage of her sexually. She served less than half of her sentence before being released. Home Office records further showed that the appellant had been convicted of other more recent offences, notably the destruction of or damage to property with a value of £5000 or less, for which she was convicted at North Essex Magistrates Court on 25 July 2012, and assault of a constable on the same date and common assault, for which she was cautioned on 5 June 2018.
4. Following an interview with officials at the airport a decision was made to refuse admission to the United Kingdom under regulation 27(5) of the EEA regulations 2016.
5. The reasons given were stated as being that due to her criminality, the respondent was satisfied that the appellant had demonstrated a propensity to reoffend and an ongoing tendency towards violent behaviour. Due to that, the respondent was satisfied that the appellant's conduct represented a present and sufficiently serious threat to more than one fundamental interests of society. The appellant appealed against this decision.
6. The appeal came before Judge Shand on 6 January 2021. She was provided with a bundle of documents from the appellant and a bundle of documents from the respondent. The case progressed by way of submissions only. In her decision Judge Shand came to the following conclusions, having considered the relevant convictions as well as the appellant's explanation:

"35. I find that the fact that the appellant was convicted of the offence of which she was convicted in 1999, 2012, and 2018 was insufficient to establish that as at 14 January 2020 the appellant presented a genuine present threat to the public in terms of regulation 27 (five) of the EEA regulations. Refusal to admit an EEA national on regulation 27 grounds is not to be based on past conduct but on future risk. It is provided in regulation 27 (five) (B) of the EEA regulations that the decision to refuse entry must be based exclusively on the personal conduct of the person concerned, and it is provided (five) (E) that a person's previous criminal convictions do not in themselves justify the decision. The conviction of the appellant for attempted murder had occurred over 20 years prior to the respondent's decision under appeal. The later convictions occurring in the course of what was essentially one incident in 2012 occurred in the context of a domestic argument with the appellant's partner at the time. In the scale of criminal offending these 2012 offences were minor. Likewise, the offence occurring on 5 June 2018 occurred in the course of a domestic argument with her partner and in the scale of criminal

offending was minor. The history of offences are not sufficient to engage the lowest threshold for removal/refusal of entry on grounds of public policy. The further three domestic incidents occurring between the appellant and Mr Vogler in respect of which no charges were brought are not sufficient even when taken together with the early offences to engage the threshold for removal/refusal of entry on grounds of public policy.

36. No evidence was led to show that as at 14 January 2020 the respondent was justified in taking the view that the appellant represented a genuine, present and sufficiently serious threat to the public. Not only was the appellant's conviction for attempted murder over 20 years old, but the respondent led no evidence of the circumstances relating to the event which gave rise to that conviction for attempted murder. The appellant has proffered an explanation in her witness statement which indicates that there were mitigating circumstances and which would not indicate that the appellant represented a serious threat to the public. Although the appellant did not give oral evidence in support of that explanation the sentence which she received in respect of the 1999 conviction is consistent with her explanation that there were mitigating circumstances relating to the offence stop in any event the onus is on the respondent to show that the lowest threshold for removal is met. The respondent has failed to do that.

37. In these circumstances I find that it is not established genuine, present and sufficiently serious threat to the public to justify the respondent's decision of that date to refuse entry to the UK."

7. Judge Shand went on to find in the alternative that if she was wrong on the above then, taking into account all the circumstances, the respondent's decision did not comply with the principle of proportionality.

The Secretary of State's challenge

8. The respondent appealed against this decision. Permission was refused by the first-tier Tribunal, but subsequently granted by the Upper Tribunal on 4 May 2021.
9. The respondent's grounds of appeal challenge both the finding that the appellant did not constitute a genuine, present and sufficiently serious threat to the public and the alternative finding that the decision was not proportionate. Both limbs of her challenge must be made out in order to successfully overturn Judge Shand's decision.

The hearing

10. Mr Lindsay relied on the grounds of appeal and expanded upon them. He accepted that in relation to the first part of the grounds of appeal, he could not advance the argument that Judge Shand did not examine the personal conduct of the appellant. He refined the respondent's case as being one challenging the approach to the assessment under the EEA regulations and a failure to apply the relevant test at all.
11. Mr Lindsay said that if we were with him as to the approach that Judge Shand took being erroneous, then such an approach was so material that it infected the findings in relation to proportionality. He submitted that the judge failed to take into account

the severity of the offences and also failed to appreciate the overall pattern of offending. This included a pattern of offending that demonstrated a pattern of violent assaults.

12. Mr Lindsay submitted that the appellant was very likely to offend or equally that if she did offend again, it would involve a violent assault. The judge had failed to adequately consider past conduct in the context of future risk.
13. He invited us to find an error of law, set aside the decision of the first-tier Tribunal, and remake the decision for ourselves dismissing the appellant's appeal.
14. Mr Nawaz has in response relied on his skeleton argument, a copy of which was provided as a rule 24 response, dated 17 June 2021. Mr Nawaz had little to add to that document save that the appellant was not a foreign criminal as defined because the offence for attempted murder was in 1999 and further that the offence itself was no longer on her criminal record and therefore has ceased to exist. Taking everything into account, as the judge did, demonstrated not only that the appellant did not represent a genuine, present and sufficiently serious threat, but that Judge Shand was entirely correct in finding as such.
15. Mr Nawaz went on to say that no evidence was submitted by the Home Office at any stage to demonstrate the background facts to the offending and that she had solely relied on an interview at the airport. Mr Nawaz concluded that the appellant had been coming and going for a number of years, his submission was more than 20 times, and that if she represented such a threat the respondent perhaps should have made such a refusal to admit decision earlier.

The applicable law

EEA Regulations 2016

Right of admission to the United Kingdom

11. – (1) An EEA national must be admitted to the United Kingdom on arrival if the EEA national produces a valid national identity card or passport issued by an EEA State.

...

(8) But this regulation is subject to regulations 23(1), (2), (3) and (4) and 31.

Exclusion and removal from the United Kingdom

23. – (1) A person is not entitled to be admitted to the United Kingdom by virtue of regulation 11 if a refusal to admit that person is justified on grounds of public policy, public security or public health in accordance with regulation 27.

(2) *A person is not entitled to be admitted to the United Kingdom by virtue of regulation 11 if that person is subject to a deportation or exclusion order, except where the person is temporarily admitted pursuant to regulation 41.*

(3) *A person is not entitled to be admitted to the United Kingdom by virtue of regulation 11 if the Secretary of State considers there to be reasonable grounds to suspect that the person's admission would lead to the misuse of a right to reside under regulation 26(1).*

(4) *A person is not entitled to be admitted to the United Kingdom as the family member of an EEA national under regulation 11(2) unless, at the time of arrival –*

(a) that person is accompanying the EEA national or joining the EEA national in the United Kingdom; and

(b) the EEA national has a right to reside.

Decisions taken on grounds of public policy, public security and public health

27. – (1) *In this regulation, a “relevant decision” means an EEA decision taken on the grounds of public policy, public security or public health.*

(2) *A relevant decision may not be taken to serve economic ends.*

(3) *A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security.*

(4) *A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who –*

(a) has a right of permanent residence under regulation 15 and who has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or

(b) is under the age of 18, unless the relevant decision is in the best interests of the person concerned, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989(1).

(5) *The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also be taken in accordance with the following principles –*

(a) the decision must comply with the principle of proportionality;

(b) the decision must be based exclusively on the personal conduct of the person concerned;

(c) the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;

(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) a person's previous criminal convictions do not in themselves justify the decision;

(f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

(6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of health, family and economic situation of P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.

(7) In the case of a relevant decision taken on grounds of public health –

(a) a disease that does not have epidemic potential as defined by the relevant instruments of the World Health Organisation or is not a disease listed in Schedule 1 to the Health Protection (Notification) Regulations 2010(2); or

(b) if the person concerned is in the United Kingdom, any disease occurring after the three month period beginning on the date on which the person arrived in the United Kingdom,

does not constitute grounds for the decision.

(8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.).

Person refused admission

30. – (1) This regulation applies to a person who is in the United Kingdom and has been refused admission to the United Kingdom –

(a) because that person does not meet the requirements of regulation 11 (including where that person does not meet those requirements because that person's EEA family permit, residence card, derivative residence card or permanent residence card has been revoked by an immigration officer in accordance with regulation 24); or

(b) in accordance with regulation 23(1), (2), (3) or (4).

(2) A person to whom this regulation applies, is to be treated as if the person were a person refused leave to enter under the 1971 Act for the purpose of paragraphs 8, 10, 10A, 11, and 16

to 19 of Schedule 2 to the 1971 Act (and the provisions of Schedule 10 to the 2016 Act apply accordingly)(1), except that the reference in paragraph 19 to a certificate of entitlement, entry clearance or work permit is to be read as a reference to an EEA family permit, residence card, derivative residence card, a qualifying EEA State residence card, or a permanent residence card.

Findings and reasons

16. It was common ground that the relevant provision in play in this appeal is that found in Regulation 27. As can be seen, a decision-maker has to take into account the following:

(5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also be taken in accordance with the following principles –

(a) the decision must comply with the principle of proportionality;

(b) the decision must be based exclusively on the personal conduct of the person concerned;

(c) the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;

(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) a person's previous criminal convictions do not in themselves justify the decision;

(f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

(6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of health, family and economic situation of P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.

17. Of particular importance in this appeal is regulation 27(5)(c). In making a decision on public policy grounds the decision-maker must take into account the personal conduct of the person and that that personal conduct must represent a genuine, present and sufficiently serious threat. Whilst the regulation goes on to note that in taking into account the past conduct of a person the threat does not need to be imminent, it is important to read that in conjunction with regulation 27(5)(e) which reinforces the principle that past conduct in of itself will not be enough to justify the decision.

18. Taking the above into account, it is plain that the central feature of the respondent's case advanced before us necessarily required us to do two things:
 - (i) Find that the previous convictions and associated behaviour, in and of themselves, demonstrated a propensity to re-offend, or at the very least demonstrated an ongoing risk, and that the judge was wrong to have concluded otherwise; and
 - (ii) Conclude that Judge Shand was not entitled to conclude on the evidence before her that the appellant did not represent a genuine, present and sufficiently serious risk.
19. In so far as the first proposition is concerned, we find that the judge was fully entitled to conclude that the offending did not, in and of itself, disclose a genuine, present and sufficiently serious risk. The respondent bore the burden of proof, and that necessarily required her to demonstrate such an ongoing risk. In our judgment, Judge Shand was entitled to conclude that the offending in of itself, even if one takes into account the "pattern" of violence, was not sufficient for the respondent to have made out her case.
20. In relation to the second proposition, we have no hesitation in concluding that Judge Shand did not fall into an error of law in her assessment. Mr Lindsay was unable to identify any legal basis to show that the judge failed to take into account any of the background circumstances, or, as he submitted, that the judge had erred in her approach to the assessment under regulation 27 of the EEA regulations.
21. It is plain that paragraphs 35, 36, and 37 draw together her assessment of the evidence and state her conclusions. She set out in considerable detail from paragraphs 26 to 33 the background circumstances to the appellant's offences. The respondent can point to nothing which discloses any error of law as regards the judge's consideration of the evidence, the reasons provided, and her approach to the relevant legal framework.
22. The EEA regulations are absolutely clear that a decision-maker cannot rely exclusively on the previous convictions of a person. Yet in this case that is, in effect, precisely what the respondent has sought to do. It was therefore impossible for the Judge Shand to go any further than to identify the convictions and then to consider the appellant's own evidence as to the circumstances pertaining thereto. This is what she did. Her overall conclusion was plainly open to her.
23. As regards the respondent's assertion that the judge precluded from taking any "mitigating" circumstances relating to the 1999 conviction into account, we reject it. On the contrary, the judge was fully entitled to take all relevant circumstances into account when conducting her assessment under regulation 27. To do otherwise would probably have amounted to an error of law.
24. There was no obligation on the judge to expressly state a conclusion on the likelihood of re-offending, or, if a further offence the level of harm that this might cause. The

only obligation imposed on the judge was to consider and apply the relevant provisions under regulation 27. The judge did just that. Certain aspects of Mr Lindsay's submissions were in reality asking for reasons for reasons. Similarly, we see no merit in the submission that other conclusions might have been consistent with the evidence. The task of the judge was to assess that evidence and reach her own conclusions in a sustainable fashion. Again, this is what she did.

25. In respect of the respondent's reliance on schedule 1 to the EEA regulations, we respectfully refer to and rely on the observations of Judge Shaerf when originally refusing permission to appeal (see the third paragraph of his decision dated 14 April 2021). There is no error here.
26. Finally, the respondent has failed to identify any errors in the judge's decision as regards the alternative proportionality assessment. The judge took relevant evidence into account and was entitled to conclude that the appellant's personal circumstances, together with all other factors, rendered the decision under appeal disproportionate. There is no merit to Mr Lindsay's suggestion that the judge failed to take account of any risk posed by the appellant to her current partner.
27. There is no material error of law in her determination. As a result, the respondent's appeal must be dismissed.

Notice of Decision

The appeal is dismissed.

The decision of the first-tier Tribunal shall stand.

No anonymity direction is made.

Signed: *T.S. Wilding*

Judge Wilding

Deputy Judge of the Upper Tribunal

Dated: 31 August 2021